

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HERMÈS INTERNATIONAL, et al.,

Plaintiffs,

v.

22 Civ. 384 (JSR)

MASON ROTHSCHILD,

Defendant.

Trial

New York, N.Y.
February 6, 2023
9:30 a.m.

Before:

HON. JED S. RAKOFF,

District Judge
-and a Jury-

APPEARANCES

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1 a likelihood of confusion between two trademarks?

2 A. Yes. I have done that many times. A rough estimate would
3 be 60 to 90 different surveys of that kind specifically.

4 Q. And the jury heard Dr. Isaacson talk about his use of the
5 *Eveready* method for testing likelihood of confusion. Have you
6 used that specific method in conduct surveys before?

7 A. I have. That's a common method, and I've probably used it
8 50 times I would say.

9 Q. Before we get into the details of what you have to say,
10 have you heard of Dr. Isaacson before this case?

11 A. I had. We actually worked on the same side of a case a
12 couple of years ago. So I was aware of him from that prior
13 case.

14 Q. And on Friday afternoon, did Dr. Isaacson approach you here
15 in the courthouse?

16 A. He did, yes. I think just to say hello, since we had never
17 met in person before, despite having worked on that case.

18 Q. Now, you testified on Friday about your assignment in this
19 case. But would you just remind us of what your goals were.

20 A. Sure. Pretty simple. To conduct a scientific review of
21 the two surveys that Dr. Isaacson did, and in particular to
22 look at his conclusion from the first survey, the one of the
23 NFT purchases, where he concluded that there was a likelihood
24 of confusion. I looked very closely at that confusion to work
25 out if it was accurate or not.

1 consideration.

2 This case has proceeded a little bit oddly in that
3 it's kind of felt at times like we're almost trying two
4 different cases. And so I thought I'd almost level set for a
5 little bit. And I want to go back to where I started a week
6 ago when I was giving my opening statement.

7 And what I told you was that there are two main
8 reasons that Hermès brought this lawsuit. First, Hermès
9 believed that consumers were going to be confused by the
10 MetaBirkins NFTs; and second, Hermès believed that the
11 MetaBirkins NFTs damaged their Birkin brand.

12 Mr. Rothschild's counsel, Mr. Millsaps, then got up
13 and talked about Mr. Rothschild's right as an artist. And he
14 then said that this case was about a multibillion-dollar
15 corporation trying to punish Mr. Rothschild because they don't
16 like his art, and because they are scared of what it might show
17 about the luxury consumer culture.

18 I submit you didn't see any evidence of that
19 throughout this trial. Hermès took no position about
20 Mr. Rothschild's art; certainly took no position about any
21 commentary. I'm not sure we heard about any commentary. And
22 Hermès is certainly not here to punish Mr. Rothschild. And
23 I'll get to that a little bit later.

24 The evidence actually showed just the opposite, right.
25 Nicholas Martin got up and testified. And his testimony was

1 that Hermès has not brought a claim like this – just a
2 trademark infringement claim, straight trademark infringement
3 claim – in over 20 years. He then said it never sued an
4 artist, it never even sent a cease and desist to an artist.
5 And that was even true for Mr. Rothschild's Baby Birkin
6 project, right.

7 So why was this case different?

8 And that's a theme I'm going to come back to in a
9 moment.

10 But let's talk for a minute about what a trademark
11 infringement case is really about. And as Judge Rakoff said,
12 he's going to provide you with the instructions. But
13 generally, trademark infringement is about consumer confusion.
14 The central question is whether a potential consumer, when he
15 or she sees the MetaBirkins NFTs, is likely to be confused that
16 they somehow are connected to or sponsored by Hermès.

17 Hermès's second claim, the damage -- where it's been
18 damaged is what's called dilution. And that looks to whether
19 the MetaBirkins NFTs somehow does damage to Hermès's Birkin
20 trademark. I'm going to explain those both a little bit more
21 later.

22 But let's get back to the central question again: Why
23 did Hermès bring this claim?

24 Now, Nicholas Martin went through those reasons.

25 First, there were 100 NFTs. They looked similar to

1 evidence.

2 Remember, in his own words: I don't think people
3 realize how much you can get away with in art by saying in the
4 style of. That's his statement to his investors.

5 We know that Mr. Rothschild adopted the Birkin name
6 and used the configuration of the Birkin bag to make money. We
7 know his goal was for these NFTs to sell at as high of a price
8 as possible. We know that people purchased these NFTs because
9 it was affiliated with a brand. Dr. Kominers' unrebutted
10 testimony makes that very plain. And we know that
11 Mr. Rothschild succeeded.

12 Not only did we discuss the press and the few comments
13 on social media, but we have Isaacson's survey. Dr. Isaacson
14 says 18.7 percent of potential NFT customers, or almost one in
15 five people, were confused.

16 Dr. Isaacson showed Mr. Rothschild's web page without
17 any changes, and one in five thought it was either Birkin or
18 Hermès.

19 But let's even say we want to believe Dr. Neal's
20 critique. It's one in 10. Right? That's how many people are
21 confused. As such, Mr. Rothschild's conduct doesn't get saved
22 by the First Amendment.

23 Now, as I said, I am going to switch a little bit here
24 to damages. As I said a little while earlier, Hermès is not
25 seeking to punish Mr. Rothschild. If punishment were Hermès'